EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-1865

Supreme Court, U.S.
FILED
MAY 2 1991
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

Fred J. Hermes, Petitioner,

v.

Secretary of Health and Human Services, Et al., Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Fred J. Hermes,
100 Judah Street,
San Francisco,Ca.94122
(415) 566-9728

Petitioner in Pro. Se.

44

QUESTIONS PRESENTED:

I Courts below committed legal error by failing to hold that a church certificate constituted 'preferred evidence', where the certificate showed that petitioner's birth of 5.21.25, was entered/established in the church's registry at baptism on 11.21.25, within the 5-year requirement.

The courts below wrongly affirmed the Secretary's decision, holding that the certificate was recorded on the day of issuance, i.e., the day it was copied from church registry on Feb. 16, 1981.

The Question to be Resolved is:

> Is a fact, such as birth, established when entered in church, hospital, government records OR is it established when the same fact is copied from the same record, say decades later?

Resolution of this question will have great effect on plans and hopes of thousands of

people throughout the country, and produce an opinion that will give guidance to the lower courts.

II It was legal error to rely on P.O.M.S., the Secretary's policy manual which does not have the force & effect of the law, to invalidate 'ALL' religious documents of 'ALL' churches in Iraq, including church documents contents of which are corroborated by affidavits and other reliable evidence.

This is deprivation of rights guaranteed under the constitution and statutory law. Many people will be gravely affected by the question presented, and it is vital that this issue be decided finally by the Court.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED	...	i
TABLE OF CONTENTS	...	iii
TABLE OF AUTHORITIES	...	iv
OPINIONS BELOW	...	1
JURISDICTION	...	2
STATEMENT OF THE CASE	...	2
REASONS FOR GRANTING THE WRIT		5
CONCLUSION	...	15
APPENDIX 'A'	...	A1-A7
'B'	...	B1-B16

TABLE OF AUTHORITIES

CASES:		Page
BLANK v. RICHARDSON (71) 439 F2d.1158		7
RICHARDSON v.PERALIS (71) 402 US. 389		8
STATUTES:		
28 U.S.C. # 405(g)	...	2,4,7
28 U.S.C. # 1254(1)	...	2
28 U.S.C. # 1291	...	2,4
42 U.S.C. # 401	...	5,7,9
42 U.S.C. # 402(a)	...	5
REGULATIONS:		
20 CFR 404.703	...	5
20 CFR 404.715	...	5
20 CFR 404.716(a)	...	3,5,6
20 CFR 404.716(b)	...	3,9
MISCELLANEOUS:		
20 Am.Jur. 2d. 626	...	12
20 Am.Jur 2d. 646	...	8
20 Am.Jur. 2d. 621	...	11

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Fred J. Hermes, Petitioner,

v.

Secretary of Health and Human Services, Et al., Respondents

Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Fred J. Hermes, petitioner in Pro. Se, petitions for a writ of certiorari to review the judgment & opinion of the United States court of appeals for the 9th circuit entered on January 7, 1991.

OPINIONS BELOW

The judgment and opinion of the United States court of appeals for the 9th circuit is reported at 926 F2d. 789, and is attached hereto at Appendix 'A', pp. A1-A7. District

court's order and judgment filed on April 2, 1990, has not been reported and is attached hereto, together with documents referred to therein, at Appendix 'B', pp.B1-B16. Petitioner accepts said judgment, including the documents, to be his record herein.

JURISDICTION:

The judgment of the court of appeals was filed on January 7, 1991. On April 7, 1991 an order extending the time to file this petition to May 7, 1991, was signed by Honorable Associate Justice Sandra D. O'Connor.

This Court's jurisdiction is invoked under 28 USC 1254(1); the district court's jurisdiction was invoked under 28 USC #405g; the court of appeals jurisdiction was under 28 USC #1291.

STATEMENT OF THE CASE:

On November 30, 1987, petitioner applied for social security, presenting, among other things, a certificate of birth and baptism [App.B11] showing that petitioner

was born on May 21, 1925, and that said birth was entered in the church registry on the day petitioner was baptised on November 21, 1925. The certificate was issued (copied from the church registry) on February 16, 1981. Social Security Administration (hereinafter the Secretary) denied petitioner's claim, holding that the church certificate was not 'preferred evidence' because it was not recorded within 5-years of birth 20 CFR 404.716(a). The Secretary held that the date the certificate was issued (copied from the church registry) on February 16, 1981, was the recording date, hence more than five years of birth.

The Secretary also held that, pursuant to P.O.M.S[1], religious records from Iraq are unreliable and invalid.

The Secretary, pursuant to 20 CFR 404.716(b), made a finding that petitioner was born on November 21, 1928. This was based on 'secondary evidence'of earliest school record, corroborated by social security, marriage and naturalization records.

---

(1) P.O.M.S. is the Secretary's office manual of suggestions which does not have the force & effect of law.

On September 28, 1989, petitioner filed action in the district court, 28 USC §405(g), seeking a review of the Secretary's decision, asserting error for invalidating the church certificate with its corroborating affidavits and that the 'secondary evidence' relied upon was inaccurate on its face. On April 2, 1990, the district court entered judgment affirming the decision and holding that the Secretary did not commit legal errorin his findings and decision was supported by substantial evidence.

On May 17, 1990, petitioner appealed district court's judgment to the court of appeals - 28 USC §1291 - seeking reversal of the judgment on the ground that it was legal error to disregard the church certificate and that the Secretary's decision was based on evidence inaccurate on its face. On January 7, 1991, the court of appeals filed its judgment affirming district court's judgment and holding that the Secretary's decision was supported by substantial evidence and was free of legal error.

REASONS FOR GRANTING THE WRIT

IT WAS ERROR TO INVALIDATE CHURCH CERTIFICATE SHOWING PETITIONER'S BIRTH OF MAY 21, 1925, WAS ENTERED IN CHURCH REGISTRY WITHIN THE 5-YEAR REQUIREMENT

DATE OF COPYING SAME INFORMATION FROM THE CHURCH REGISTRY ON FEBRUARY 16, 1981 WAS NOT THE RECORDING DATE.

IT IS VITAL THIS ISSUE BE RESOLVED BY THE SUPREME COURT.

Under Title II of the Social Security Act, 42 USC 401 et Seq, applicant is entitled to social security benefits if s/he attains age 62 and meets other eligibility requirements not at issue in this case. 42 USC 402(a). The applicant has the burden of proving his age requirement. 20 CFR 404.703, 715.

Petitioner met his burden of proving his age by providing a Certificate of Birth and Baptism [App.B11], which pursuant to the Secretary's implementing regulations, constituted 'preferred evidence' 20 CFR 404.716(a). The certificate was issued (copied from the church registry) on February 16,1981, and cer-

tified that petitioner was born on 5.21.25, and that his birth was recorded in the church registry on the day petitioner was baptised on November 11, 1925, thereby in compliance with the requirement that birth be recorded within five years.

The Secretary demanded whether said certification could be corroborated by other evidence. Petitioner, in compliance therewith, obtained affidavits [App.B12,14] from church elders with personal knowledge, and statement from family members, health insurance, employment etc, corroborating the contents of the church certificate and/or year of birth.

After considering the evidence presented the Secretary invalidated the church certificate with its corroborating evidence, holding that the church certificate was recorded on the day it was issued (copied from the church registry) on February 16, 1981, hence not in compliance with the 5-year requirement. 20-CFR 404.716(a). This action was erroneous because petitioner's birth was not established on February 16, 1981, but it was established

on November 21, 1925, when entered in the church registry at baptism and as the certificate certified. This action deprived petitioner of his rights guaranteed under the constitution and the statutory law. 42 USC 401, Et.Seq.

In BLANK v. RICHARDSON (71) 439 F2d.1158, the Secretary, based on school records, made a finding that claimant was born in 1907. A delayed birth certificate, corroborated by statements of brothers and sisters, indicated that he was born in 1905. The appellate court, in reviewing the Secretary's decision, said that, although 42 USC 405(g) required a reviewing court to give conclusive weight to findings of fact made by the Secretary as to age of claimant, the court's function is to review the entire body of evidence, including that which is opposed to Secretary's views. The court held that the delayed birth certificate supported by statements of brothers & sisters outweighed Secretary's conclusions.

It is evident that in this case, as in

the BLANK case, the contents of the delayed church certificate were corroborated by affidavits, given under penalty of perjury, by church elders with personal knowledge. It has been held that affidivats, standing alone, may not be convincing, but prove to be valuable evidence corroborating an alleged date of birth, especially where affiants have personal knowledge of the facts. 29 Am.Jur.2d. 646; RICHARDSON v. PERALIS (71)402 US 389, holding that corroborated medical reports were properly admitted and constituted substantial evidence. Petitioner's birth year was further corroborated by statements from family members, health insurance, employment, etc.

The evidence also showed that MARY, Petitioner's sister was born in 1928. To hold that petitioner was also born in 1928, would be unreasonable to ride roughshod over the memories of brothers and sisters as heirchy of the children in the family. The Secretary would rewrite the family tree contrary to the recollection of the family members.

Prtitioner asserts that the Secretary's findings and interpretations were erroneous amounting to a deprivation of rights and benefits guaranteed under the constitution and statutory law. 42 USC 401 et seq.

The Question to be resolved is:

> IS A FACT, SUCH AS BIRTH, ESTABLISHED WHEN ENTERED IN CHURCH, HOSPITAL, GOVERNMENTRECORDS OR IS IT ESTABLISHED WHEN THE SAME FACT IS COPIED FROM THE ORIGINAL RECORD, SAY DECADES LATER?

This case raises an important question whose resolution will have immediate importance far beyond the particular facts and parties involved. This Court must decide principles upon which are based the plans, hopes and aspirations of a great many people throughout the country, and produce an opinion that will give guidance to the lower courts.

After invalidating the church certificate, the Secretary, pursuant to 20 CFR 404.716(b), made a finding that petitioner was born on Nov. 21, 1928, hence had not attained

age 62 and not entitled to benefits. This was based on earliest records of school, corroborated by social security, marriage & naturalization records.

As to the other birth dates upon which the Secretary based his finding, the courts below should have considered facts in the record that petitioner, for decades, had used different birth dates to present himself younger without any intention to defraud anyone or entity or gain dirivitive benefits. Petitioner and petitioner alone, without any supporting document, individual or entity, had entered different inaccurate dates of birth at schools, employment, social security, etc. For example, he had entered dates of 5.14.27 and 11.21.28 with Social Security; 11.21.28, 11.21.29, 11.21.30 in schools; 11.21.30 insurance, etc..

At naturalization hearing, since there were no documents to support his birth date, and since there were multiple dates, the 11.21.28 date was compromised. Thus, an objective review of the facts and

dates would, without any doubt, lead one to find that all such dates were inaccurate and false, given by petitioner and petitioner alone, uncorroborated by any document, individual or entity. Thus, the oldest record cannot always be considered to the exclusion of other reliable evidence, and greatest weight cannot be given to the oldest record when such record is inconclusive. 70 Am.Jur. 2d.621.

When situations like this arise, the courts are called upon to pass on Secretary's considerations of such other evidence and the circumstances attending their establishment. The courts below failed to give proper consideration to the Secretary's conclusions regarding the different dates of birth and the circumstances under which the many birth dates were made.

It is not a fair or sound judgment to penalize a claimant and deprive him of his rights and benefits because of:

patently unharmful, innocent & ignorant

acts to present himself younger, which is an American practice. **Two Wrongs a Right do not Make.**

Petitioner asserts that the finding that petitioner was born on November 21, 1928, should be reversed because it was based on false and inaccurate evidence on its face, and that the church certificate be accorded proper weight and status because petitioner's birth was entered and established within the 5-year requirement. 20 Am.Jur.2d.626.

II **IT WAS ERROR TO RELY ON P.O.M.S, A POLICY MANUAL THAT DOES NOT HAVE THE FORCE AND EFFECT OF THE LAW TO INVALIDATE 'ALL' RELIGIOUS RECORDS OF 'ALL' CHURCHES IN IRAQ, INCLUDING THOSE CORROBORATED BY AFFIDAVITS AND OTHER RELIABLE EVIDENCE.**

The Secretary referrenced and relied considerably on P.O.M.S. (Policy Operation

Manual Systems) which regards all church records from Iraq unreliable and invalid.

Petitioner asserts that P.O.M.S. is an outline of suggestions which does not have the force and effect of the law. Arguendo, even if some of the church records in Iraq may be unreliable, but, is it fair, logic or sound judgment to assume that 'ALL' records of 'ALL' churches in Iraq are invalid? Even records that are corroborated, as in this case, by affidavits and other reliable evidence?

As to the Assyrian Evangelical Church it is appropriate that the Court take Judicial notice of the 'historical facts' as to the conditions and customs following WWI and the early twenties in that part of the world, to that group of people (christians fleeing turkish massacre) united by faith and church, their only haven. At that time and in such camps, not all Mesopotamia, (presently Iraq) babies were delivered by midwives, and records of birth, baptism,

marriage, death...were entered and kept by the church, the only source that can be referred to for that era. Such records were accurate and reliable.

The Court must also consider the fact, which the courts below failed to do, that petitioner was not 'motivated' by a desire for benefits. State Retirement Agency told petitioner to file with Social Security to insure medicare at age 65[1]. W-2s presented to the Secretary showed earnings of $60,000 in 1987; $38,000 in 1988; expecting over $30,000 in 1989, plus association with a real estate firm. Such income and expected future earnings rendered petitioner unqualified for monetary benefits.

Petitioner asserted that throughout his life he was never asked or required to prove his date of birth with documents or other means, by any school, entity, public or private. Petitioner gave varying birth

---

(1) Petitioner retired in May, 1987, did not apply for social security till end of November, 1987.

dates depending on the time or occasion. The church certificate was not obtained by petitioner, nor had he asked for it. It was obtained by a family friend, leaving the country during the Iran/Iraq war, taking out whatever assets and documents he could for family and friends, including petitioner's church certificate. At that time petitioner was was working in the United States without any plans or inclination for retirement or applying for social security.

Thus, considering the evidence as a whole, it is evident that such facts and reasoning far outweigh the suggestions in P.O.M.S. Thousands of individuals throughout the country will be affected by this Court decision.

CONCLUSION

It is submitted that petitioner met his burden to prove his age because the church certificate showed that his birth was recorded in the church registry within six months

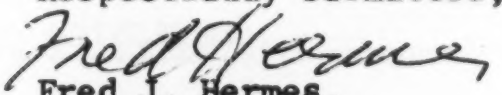
and corroborated by affidavits and other reliable evidence.

It is submitted that the evidence of birth dates relied upon by the Secretary to support his decision is false and inaccurate on its face, thereby supporting a conclusion that the decision is not supported by substantial evidence.

It is further submitted that the evidence and reasoning thereof far outweigh the suggestions in P.O.M.S.

For the above reasons and the fact that the issues raised in this petition affect a great number of people throughout the country, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Fred J. Hermes,
100 Judah Street,
San Francisco, Ca.94122
(415) 566-9728

May 24, 1991.

APPENDIX

A & B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED J. HERMES, *Plaintiff-Appellant,* v. SECRETARY OF HEALTH & HUMAN SERVICES; SOCIAL SECURITY ADMINISTRATION, *Defendants-Appellees.*	No. 90-15448 D.C. No. CV-89-3527-CAL ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
December 14, 1990—Pasadena, California

Memorandum Filed January 7, 1991
Order and Opinion Filed February 21, 1991

Before: Joseph T. Sneed, Mary M. Schroeder and William C. Canby, Jr., Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Social Security

Affirming a district court grant of summary judgment, the court of appeals held that the DHHS properly determined

appellant's date of birth in denying him social security retirement benefits.

DHHS denied appellant Fred J. Hermes' request for social security retirement benefits. An ALJ found that Hermes' date of birth was November 21, 1928 rather than May 25, 1925. Hermes produced an entire series of documents indicating numerous birth dates between 1925 and 1930. Hermes admitted that he listed the various birth dates to look younger. The district court denied DHHS' determination.

[1] Although Hermes produced a religious birth record from Iraq showing a baptismal date and a birth date, that record was recorded in 1981. [2] The ALJ and the district court properly concluded that this record was not preferred evidence. It was not recorded within five years of Hermes' birth. [3] The district court properly concluded that the oldest evidence of Hermes' age or date of birth, which could be corroborated, would have the greatest probative value. [4] The oldest evidence that could be corroborated was a college record, corroborated by other evidence, that established the claimant's date of birth as November 21, 1928. [5] The five pieces of other evidence that supported a birth date in 1925 were recorded previous to, or after, Hermes filed his application for benefits. This was too recent to overcome the force of the older evidence. DHHS was entitled to accord greater weight to the documentation that was recorded many years earlier.

COUNSEL

Fred J. Hermes, Pro Se, San Francisco, California, for the plaintiff-appellant.

Joseph Stein, Assistant Regional Counsel, Department of Health and Human Services, San Francisco, California, for the defendants-appellees.

ORDER

The memorandum disposition filed January 7, 1991, is redesignated as an authored opinion by Judge Sneed.

OPINION

SNEED, Circuit Judge:

Plaintiff seeks an order reversing the final decision of the Secretary of Health and Human Services (Secretary) denying his claim for social security retirement insurance benefits under Title II of the Social Security Act. Appellant's sole contention is that the administrative law judge (ALJ) wrongly concluded that his date of birth was November 21, 1928 rather than May 25, 1925. The district court upheld the Secretary's finding. We affirm.

The decision of a district judge granting summary judgment is reviewed de novo. *See Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied* 110 S.Ct. 3217 (1990). The panel's review is governed by the same standard used by the trial court. *See Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). The Secretary's decision should only be disturbed "if it is not supported by substantial evidence or it is based on legal error." *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir. 1986). When the evidence as a whole can support either outcome, the court may not substitute its judgment for that of the ALJ's. *See Key v. Heckler*, 754 F.2d 1545, 1548 (9th Cir. 1985).

Appellant filed an application for social security retirement insurance benefits on November 30, 1987. The Social Security Administration (SSA) denied appellant's claim initially, and again after reconsideration, on the ground that appellant

was born on November 21, 1928 and at the time of application had not yet reached the age of 62. Plaintiff appealed the denial and the ALJ heard the case de novo. Appellant testified before the ALJ on January 1, 1989. On March 21, 1989, the ALJ issued her decision and concluded that appellant was born on November 21, 1928. This determination became the "final decision" of the Secretary when the Appeals Council denied appellant's request for review of the ALJ's decision on August 10, 1989.

Appellant filed this action in district court on September 28, 1989. On April 2, 1990, upon cross-motions for summary judgment, the district court, as already indicated, ruled in favor of the Secretary after concluding that appellant's date of birth was November 21, 1928.

The appellant produced an entire series of documents indicating numerous birth dates between 1925 and 1930. A table detailing the various records, the birth dates they indicate, and the time they were recorded, can be found below. Appellant admitted in his hearing before the ALJ that he had listed the various birth dates. He testified that he never intended to defraud anyone but that he simply wanted to appear younger.

Table of Possible Birth Dates for Fred J. Hermes

Document	*Date Established*	*Age or Date of Birth Recorded*
SSA Record	December 1953	May 14, 1927
College Record	Feb. 1954	Nov. 21, 1928
Marriage Certificate	Jan. 25, 1960	Age 31/DOB 1928
SSA Record	Jan. 1961	Nov. 21, 1928
Divorce Action Questionnaire	July 5, 1962	Age 32/DOB 1929-30

Law School Record	Sept. 24, 1962	Nov. 21, 1929
Certificate of Naturalization	Oct. 19, 1965	Nov. 21, 1928
State Bar Application	1966	Nov. 21, 1930
Life Insurance Application	Aug. 20, 1967	Nov. 21, 1930
Certificate of Birth	Feb. 16, 1981	May 25, 1925
Driver's License	Oct. 10, 1985	Nov. 21, 1929
Insurance Card	Prior to Oct. 1987	May 1925
Personnel Document	Feb. 17, 1988	May 21, 1925
Kanon Affidavit (distant relative & friend)	March 23, 1988	Early 1920s
Hermes Declaration	Jan. 26, 1989	May 1925

[1] Appellant argued that he was born in 1925. He placed great emphasis on his religious birth record obtained from Iraq in 1981. This record shows a baptismal date of November 21, 1925 and a birth date of May 21, 1925. The document was recorded on February 16, 1981. Normally, a birth record is classified as "preferred evidence." The regulations on preferred evidence provide that:

> The best evidence of your age, if you can obtain it, is either: a birth certificate or hospital birth record recorded before age 5; or a religious record which shows your date of birth and was recorded before age 5.

20 C.F.R. § 404.716(a) (1990). If a birth record meets these criteria, it is generally considered convincing. *See* 20 C.F.R. § 404.709 (1990).

[2] The ALJ and district court both concluded that the Iraqi birth record was not preferred evidence. We agree. The birth record was not recorded within five years of appellant's birth. Moreover, § 00307.540 of the Social Security Administration's Operations Manual System (POMS) cautions against the use of religious records from Iraq.

> Religious records from all sources within Iraq are highly suspect. This includes religious records secured by or through churches in the U.S. from religious authorities in Iraq. Many Iraqi churches do not have records for older persons, or where such records do exist, they are in such poor condition as to be unusable. Experience has shown that religious authorities have issued certificates for events which occurred in other parishes or countries, for events for which there are no records, based on the statements of interested parties even where they conflicted with existing records, or because the individual appeared old and/or in need.[1]

See Certified Record at 111-12. The ALJ and district court, doubting the reliability of this record, were entitled to examine the additional evidence. *See* 20 C.F.R. § 404.709 (1990).

[3] The ALJ carefully reviewed the other evidence. The court concluded that the oldest evidence of the appellant's age or date of birth, which could be corroborated, would have the greatest probative value. In determining the probative value of documents submitted as proof of age "consideration

[1]POMS is a policy manual and, therefore, does not have the force and effect of law. It is, nevertheless, persuasive. *See Evelyn v. Schweiker*, 685 F.2d 351, 352 n.5 (9th Cir. 1982).

will be given to when such other documents were established or recorded, and the circumstances attending their establishment or recordation." 20 C.F.R. § 416.803 (1990).

[4] The oldest evidence, the SSA record of December 1953, contained a birth date that could not be corroborated. The court turned to the next oldest piece of evidence, the claimant's college record, which indicated a birth date of November 21, 1928. Finding that this was further corroborated by the claimant's marriage certificate, a later SSA record, and his certificate of naturalization, the ALJ properly concluded that the claimant's birth date was November 21, 1928.

[5] The five pieces of evidence that support a birth date in 1925 were recorded just previous to, or after, appellant filed his application for benefits. This is too recent to overcome the force of the older evidence. The ALJ and the Secretary clearly were entitled to accord greater weight to the documentation that was recorded many years earlier.

Although the evidence supports several possible birth dates, an examination of this evidence in its entirety demonstrates that the Secretary's decision was supported by substantial evidence and was free of legal error. Where there is substantial evidence to support the decision made by the ALJ, as well as evidence to support a contrary determination, this court will not substitute its judgment for that of the ALJ. *See Key v. Heckler*, 754 F.2d at 1549.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Fred J.Hermes, Plaintiff,	)	
v.	)	No.C-89-3527-CAL
Louis Sullivan, Defendant.	)	

ORDER

Plaintiff brings this action pursuant to 42 USC #405(g), seeking an order reversing the final decision of the Secretary of Health & Human Services (the Secretary), which denied his claim for social security retirement insurance benefits under Title II of the Social Security Act (the Act). The matter is now before this court on cross-motion for summary judgment.

After considering the record, the relevant authorities, and the presentations of counsel, this court concludes that the Secretary did not commit legal error in reaching his decision and that the decision was supported by substantial evidence.

I.

Plaintiff filed his application for social security retirement insurance benefits on Nov. 30, 1987. The Social Security Administration

denied plaintiff's claim initially and upon reconsideration, on the ground that plaintiff was born on November 21, 1928 and therefore had not attained the minimum requisite age of 62 (Tr.98-100). Plaintiff appealed the denial and on March 21, 1989, an administrative law judge ("ALJ") denied plaintiff's claim, finding that plaintiff's date of birth was November 21, 1928 (Tr.10-13).The ALJ's decision became the "final decision" of the Secretary of Heal and Human Services when the Appeals Council denied plaintiff's request for review on August 10,1989.(Tr.4--5)

Plaintiff's sole contention on appeal is that the ALJwrongly concluded that plaintiff's date of birth was November 21, 1928, rather than May 25, 1925.

II.

Under Title II of the Social Security Act, an individual is entitled to retirement insurance benefits if he had attained age 62 and meets other eligibility requirements not at issue in this case. 42 USC #402(a). Regulations on "preferred evidence" provide that:

> The best evidence of your age, if you can obtain it, is either: a birth cer-

> tificate or hospital birth record recorded before age 5; or a religious record which shows your date of birth and was recorded before age 5.

20 CFR #404.716(a). Such evidence will generally be deemed convincing, 20 CFR #404.709. If such evidence is unavailable, other proof may be considered, 20 CFR #404.709. Such evidence may include:

> an original family bible or family record school records; census records; a statement signed by the physician or midwife who was present at your birth; insurance policies; a marriage record; a passport; an employment record; a delayed birth certificate, your child's birth certificate; or an immigration or naturalization record.

20 CFR #404.716(b). This evidence is then evaluated to determine whether:

> (a) Information contained in the evidence was given by a person in a position to know the facts;
>
> (b) There was any reason to give false information when the evidence was created.
>
> (c) Information contained in the evidence was given under oath, or with witnesses present, or with the knowledge there wasa penalty for giving false information
>
> (d)The evidence was created at the time the event took place or shortly thereafter;
>
> (e) The evidence has been altered or has any erasure on it; and
>
> (f) Information contained in the evidence agrees with other available evidence, including (social Security Administration) records.

20 CFR #404.708. If the evidence presented consists of several different records or documents which all show the same information it may be considered convincing.20 CFR #404.709.

III

The documents introduced at plaintiff's hearing revealed dated of birth ranging from 1925 to 1930. Plaintiff stated that he had used different dates of birth, but that he had not done so to defraud any or derive benefits; instead, his motivation was to appear younger (Tr.36).

Plaintiff argues that a "Certificate of Birth & Baptism" from the Assyrian Evangelical Church in Bagsad (Tr.70) should have been considered 'preferred evidence." This certificate was issued on February 16, 1981 to a freind of plaintiff's family who travelled to Bagdad (Tr.45). It shows a baptism date of Nov.21, 1925, and a birth date of May 21, 1925.

Plaintiff says that at the time of his birth, he was a refugee in a camp in Bagdad, and the only record of his birth was in the

family bible; in accord with custom, his date of birth was entered in church records at the time of baptism. Plaintiff argues that the Certificate of Birth & Baptism recorded information from church records that were established within the five-year requirement. But the certificate shows only that was issued in 1981; it does not show when the information was entered on the church records. Moreover, #00307.540(C) of SSA's Operations Manuel Systems ("POMS) especially cautions that religious records from all sources within Iraq are highly suspect (Tr.112). POMS is policy and procedure manual that is persuasive but does not have the force and effect of law (Evelyn v. Schweiker, 684 F2.351 352 n.5 (9th Cir.1982).

Plaintiff also produced the affidavit of an old family friend (Tr.103), a declaration of his father (Tr.137) and statements of his sister (Tr.82,89) that corroborated the May 21, 1925 date. Additionally a California State personnel document (Tr.99,115)health insurance card (Tr.72,89) and old passport (Tr.95) showed the May 21, 1925 date. Thus

plaintiff contends that the weight of the evidence compelled a determination that plaintiff's birth date was May 21, 1928.

The ALJ rejected the Certifcate as "preferred evidence" and examined all of the available documentation before concluding that the most convincing evidence established plaintiff's birth date to be Nov. 21, 1928. Evidence demonstrating this date including the following: a school record dating from 1954 (Tr.76), a marriage certificate issued on January 25, 1960 which revealed an age of 31 (Tr.68)[1] Social Security Administration recording from 1961 (Tr.99), and plaintiff's certificate of Naturalization issued in 1965 (Tr.69).

The scope of review by this court of the Secretary's decision is limited. The Secretary's determination will be upheld if the

---

[1]Plaintiff takes particular issue with the ALJ's conclusion that this document supported a finding of the Nov.21, 1928 birth date. Plaintiff argues that the document supports a finding that plaintiff's date of birth was in 1929.

Plaintiff's calculation is erroneous. If he was born on Nov.21, 1928, his age on Ja.25, 1960 when the marriage certificate was established, would have been 31.

if the findings of fact are supported by substantial evidence and if the Secretary applied the proper legal standards. Delgado v. Heckler 722 F2d.570,572 (9th Cir.1983). Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Richardson v. Peralis, 402 US 389,401 (1971). The reviewing court must look at the record as a whole and not merely at the evidence lending supportto a finding. Cox v. Califano, 587 F2d.988,990 (9th Cir.1978). Where the evidence as a whole can support either outcome, the reviewing court may not substitute its judgment for the Secretary's. Key v. Heckler, 754 F2d.1545,1549 (9th Cir.1985). Moreover where evidence is inconclusive, questions of credibility and resolution of conflicts in the evidence are functions solely of the Secretary. Sample v. Schweiker, 694 F2d.639,642 (9th Cir.82)

V.

The Certificate of Birth & Baptism produced by plaintiff was issued in 1981. Although the certificate professes that the information is identical with that in the records of the church

The certificate itself was not recorded before plaintiff was 5; nor does the certificate reveal when the original church records were recorded. POMS provides that religious records from Iraq can be used as evidence of age only if a specific recordation date is shown on the certificate (Tr.112). Thus the evidence was not 'preferred evidence'

Moreover, even if the evidece is technically 'preferred," if there is a reason to doube the reliability of this "preferred evidence," other evidence can be requested. 20 CFR 404.709. In light of POMS's guidance that religious records from Iraq are 'highly suspect," any request for additional evidence was not improper.

There was adequate evidence to support many conclusions. Thedetermination of plaintiff's age involved questions of credibility and resolution of conflicts in the evidence, so the Secretary was in a unique position to arrive at a determination. If this court were to reverse the Secretary's finding, it would be substituting its judgment for that

of the Secretary; see Key v. Heckler, 754 F2d. at 1549.

Accordingly, it is hereby ordered that:

1. Plaintiff's motion for summary judgment is denied.

2. Defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

Dated April 2, 1990.

CHARLES A. LEGGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRED J. HERMES, Plaintiff	)	
v.	)	No. C89-3527-CAL
LOUIS SULLIVAN, Defendant.	)	JUDGMENT

This court have considered the pleadings and the matter having been duly submitted, and this court having granted defendant's cross-motion for summary judgment;

JUDGMENT IS HEREBY ENTERED in favor of defendant and against plaintiff.

Dated: April 2, 1990.

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

ASSYRIAN EVANGELICAL CHURCH
Bagdad, Iraq

CERTIFICATE OF BIRTH AND BAPTISM.

No.5/148

BAPTISING THEM IN THE NAME OF THE FATHER & THE SONE & THE HOLY GHOST (Matt.28:19)

Name of Child	Fred
Name of Father	Younathan Isaac Hermes
Name of Mother	Elizabeth Daniel
Place of Birth	Bagdad
Date of Birth	21st May, 1925.
Place of Baptism	Bagdad.
Date of Baptism	21st November, 1925.
Place of Parents Residence	U.S.A.
Name of Baptising Minister	Rev. Pera Mirza

Remarks: To whom it may concern

We certify that the above information is identiaal with that in the Records of the Assyrian Evangelical Church in Bagdad, Vide Page 5 No. 5/148.

Sgd. G.O.Geuargis
(Church Seal)
Church Committee Chairman

Daye 16th February, 1981.

Assyrian Evangelical Church
Bagdad.

PHILIP KANON, being duly sworn, says:

That my full name is stated above, that I reside at 1311 Romulus Av, Glendale, Ca.; that I was born in Urmia, Persia, on July 4, 1910; that I am a United States citizen; and I am distantly related to and a close friend of the HERMES family.

That to the best of my knowledge JONATHAN ISAAC HERMES was born in Urmia, Persia, during the first decade of this century.

That to my own knowledge, said JONATHAN HERMES married one ELIZABETH(elishua)DANIEL in 1921, and that in early twenties the following children were born:

YUL J. HERMES,
FRED J. HERMES,

then MARY J.HERMES was born (now deceased) and the other children born thereafter in the 30 and 40s were:

ALICE J. HERMES,
SARGON J. HERMES,
SEMIRAMIS J. HERMES,
SAM(SENAKARIB) J.HERMES and
NINOS (JAMES) J. HERMES

That to my own knowledge said ELIZABETH DANIEL HERMES died of natural causes in 1945, and said JONATHAN I. HERMES, in 1961 married one VICTORIA YOUSIF and of this marriage in 1963 MARY J. HERMES was born.

That during the entire period, up to the time of immigration to the United States, our families have almost resided in the same town in Iraq and have always been in close touch, up to the present.

Sgd. PHILIP KANON.

Notarized, signed and seal on
M arch 23, 1988, Los Angeles County,
ERMA L. SOTO, Notory Public
Commission Expires September 18, 1990.

I, JONATHAN I. HERMES, under penalty of perjury declare:

1. I am a U.S. citizen, residing at 115 Cardoza, Hercules, Ca. 94547.
2. That I was born in Urmia, Persian in 1906.
3. That during W.W.I, the christians in that area, including our tribe, escaped the Turkish massacre fleeing South and ultimately by the end of 1918 settled in camps along Tigris River, Mesopotamia, presently Iraq. We were declared refugees by the British Forces.
4. That in 1921 I married Elizabeth Daniel and our first child, Yuel, was born in February 1923, Then Fred in May, 1925, Mary 1928, died as child, Alice in Jan. 1930, and all the other children in 30s. My wife, God Bless her soil, passed away in 1945. In 1961 I married Victoria Joseph and Mary was born in March, 1963.
5. That during the 20s and most of 30s the children were born at home attended by mid-wives. We kept records of such

births and other events in the family Old Testiment and were only recorded at baptismal in church.

Sgd.JONATHAN I.HERMES

Notirized and stamped and signed on
January 26, 1989, in San Francisco.
PAT CARLIN, Notary Public
City & County of San Francisco
My Commission Expired February 6, 1991.